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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

SPENCER ABRAHAM, Secretary of Energy, et al.,

Defendants.

No. CT-03-5018-AAM

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

COLUMBIA RIVERKEEPER, et al.,

Plaintiffs,

vs.

SPENCER ABRAHAM, Secretary of Energy, et al.,

Defendants.

No. CT-03-5044-AAM

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION

BEFORE THE COURT are motions for preliminary injunction filed by the State of Washington in CT-03-5018-AAM (Ct. Rec. 5)

and by the plaintiff non-profit groups in CT-03-5044-AAM (Ct. Rec. 7).[1]

These motions were heard with oral argument on May 2, 2003. Joseph E. Shorin III, Esq., appeared for the State of Washington. Brent Foster, Esq., appeared for the plaintiff non-profit groups. Cynthia Huber, Esq., and Michael Zevenbergen, Esq., appeared for the defendants. At the hearing, the court ordered defendants temporarily restrained from making any further shipments of transuranic waste pending issuance of this order on preliminary injunction.

I. BACKGROUND

Plaintiff State of Washington has filed an action seeking declaratory and injunctive relief against defendants Spencer Abraham, Secretary of the United States Department of Energy (DOE), and the Department of Energy itself. Plaintiff alleges DOE has decided to ship radioactive and radioactive/hazardous mixed transuranic waste to the Hanford Nuclear Reservation (Hanford) in violation of the National Environmental Policy Act (NEPA) and in violation of Washington's Hazardous Waste Management Act (HWMA).

Plaintiffs Columbia Riverkeeper, et al., have also filed an action against the same defendants alleging the same intended

[1] Defendants' Motion for Leave to File Sur-reply Re State's HWMA Claim (Ct. Rec. 54 in CT-03-5018-AAM) is **GRANTED** as are various motions for leave to file overlength brief (Ct. Recs. 32 and 39 in CT-03-5018-AAM; Ct. Recs. 13 and 18 in CT-03-5044-AAM).

shipments of waste violate NEPA. Plaintiffs' action was originally filed in the District of Oregon. Pursuant to stipulation of the parties, it was transferred to this district and consolidated with the action filed by the State of Washington.

II. FACTUAL AND PROCEDURAL HISTORY

In May 1997, DOE issued a "Final Waste Management Programmatic Environmental Impact Statement" ("PEIS" or "WM PEIS") for managing treatment, storage, and disposal of radioactive and hazardous waste. Among the types of waste addressed was transuranic waste ("TRUW" or "TRU"). TRUW is waste containing alpha particle-emitting radionuclides with atomic numbers greater than that of uranium (92) and half-lives greater than 20 years in concentrations greater than 100 nanocuries per gram of waste. TRUW is categorized as either contact-handled ("CH") or remote-handled ("RH") depending on the level of radioactivity emitted at a waste container's surface. CH waste has less radioactivity and therefore, CH waste containers can be handled directly by workers. RH waste has greater radioactivity and therefore, must be handled with machinery designed to shield workers from radiation. Transuranic waste is sometimes mixed waste ("TRUWM" or "TRUM") containing both radioactive and hazardous components such as solvents and heavy metals. Some TRUW is mixed with polychlorinated biphenyls ("PCBs").

DOE has decided to dispose of TRUW at the Waste Isolation

Pilot Project ("WIPP") located near Carlsbad, New Mexico "after preparation . . . to meet WIPP's waste acceptance criteria." The 1997 PEIS issued by DOE examined where to store and, if necessary, treat TRUW prior to its disposal at WIPP. Several alternatives were considered. The "Centralized Alternative" had CH-TRUW from all DOE facilities shipped directly to WIPP for treatment and disposal and RH-TRUW from all facilities shipped to Hanford and the Oak Ridge Reservation in Tennessee for treatment and interim storage prior to disposal at WIPP. The "Regionalized Alternative" had TRUW shipped from sites with small amounts of such waste to designated DOE facilities that had the largest amounts of TRUW for treatment and interim storage prior to final disposal at WIPP. The "Decentralized Alternative" had DOE facilities keep the TRUW they generated on-site for treatment and interim storage prior to direct shipment to WIPP for disposal. The "Preferred Alternative" was a modified decentralized approach in which TRUW would be shipped from five small sites to larger sites (not including Hanford).

In January 1998, DOE issued a Record of Decision ("ROD") on where it would prepare and store its TRUW prior to disposal. DOE decided that each of its sites which currently had or would generate TRUW would prepare and store its TRUW on-site, with the exception that the Sandia National Laboratory in New Mexico would transfer its TRUW to the Los Alamos National Laboratory. This decision was based on the 1997 PEIS and represented a modification of the "Decentralized Alternative" proposed in the

PEIS. The ROD noted, however, that:

> In the future, DOE may decide to ship TRU wastes from sites where it may be impractical to prepare them for disposal to sites where DOE has or will have the necessary capability. The sites that could receive such shipments of TRU waste are the Idaho National Engineering and Environmental Laboratory (INEEL), the Oak Ridge Reservation (ORR), the Savannah River Site (SRS) and the Hanford Site. **However, any future decisions regarding transfers of TRU wastes would be subject to appropriate review under the National Environmental Policy Act (NEPA), and the agreements DOE has entered into, such as those with States, relating to the treatment and storage of TRU waste. Future NEPA review could include, but would not necessarily be limited to, analysis of the need to supplement existing environmental reviews.** DOE would conduct all such TRU waste shipments between sites in accordance with applicable transportation requirements and would coordinate these shipments with appropriate State, Tribal and local authorities.

(Emphasis added).

DOE eventually revised its January 1998 ROD in a decision issued on August 27, 2002 and published in the Federal Register on September 6, 2002. It "now decided to transfer approximately 27 cubic meters of transuranic (TRU) waste from a portion of the Battelle Columbus Laboratory ("BCL"), the Battelle West Jefferson North Site (West Jefferson) in Columbus, Ohio, and approximately 9 cubic meters of TRU waste from the Energy Technology Engineering Center (ETEC) in Canoga Park, California, to the Hanford Site near Richland, Washington, for storage." DOE "expects" this waste will ultimately be shipped to the WIPP for disposal. DOE concluded that additional NEPA review was not required for this revision.

The Battelle and ETEC waste is a combination of both CH and RH-TRUW, but predominantly the latter. Some of it is also mixed transuranic waste (TRUWM). Hanford currently has no facilities for treating or packaging RH-TRUW or TRUW contaminated with PCBs.[2] Approximately 80,000 55-gallon drum equivalents of TRUW and suspected TRUW are already stored at Hanford.

WIPP is currently permitted to handle only CH-TRUW. It is not yet permitted to handle RH-TRUW. On June 28, 2002, DOE submitted a request to the U.S. Environmental Protection Agency (EPA) for an amendment to its certification of WIPP and to New Mexico for an amendment to the Resource Conservation Recovery Act (RCRA) permit for WIPP that would allow disposal of RH-TRUW at WIPP. It will be at least until 2005 before any RH-TRUW can be shipped to WIPP.

DOE has also asked EPA to authorize WIPP as a chemical waste landfill under the Toxic Substances Control Act which would allow disposal, without treatment, of some or all of DOE's PCB-contaminated TRUW. Currently, WIPP is not permitted to accept PCB-contaminated TRUW.

There apparently is no dispute that all of the ETEC TRUW has already been shipped to Hanford. Some of the Battelle TRUW has

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[2] The September 6, 2002 ROD states Hanford's "planning for facilities and operations to characterize, certify and package remote-handled TRU waste is also well underway." (ROD at p. 6). According to DOE, Hanford "is currently analyzing additional facilities to characterize and prepare remote-handled TRU waste in the Draft Hanford Site Solid (Radioactive and Hazardous) Waste Program Environmental Impact Statement (DOE/EIS-0286D, April 2002, Richland Operations)." (ROD at p. 7, fn. 5).

also been shipped. According to the State, on or about December 20, 2002, Hanford received four shipments of TRUW, two each from ETEC and Battelle. Furthermore, according to the State, on February 6, 2003, Hanford received two additional shipments from Battelle. By the State's calculation, DOE has completed six shipments containing a total of 40 drums of TRUW, of which 13 are CH-TRUW and 27 are RH-TRUW. What remains to be shipped, according to Jessie Hill Roberson, DOE Assistant Secretary, Office of Environmental Management, are seven drums of CH-TRUW and 111 drums of RH-TRUW from Battelle.

Plaintiffs seek a preliminary injunction prohibiting DOE from shipping any additional TRUW to Hanford pending final resolution of this litigation. Plaintiffs contend the shipments from ETEC and Battelle are the just the first step in a much broader and coordinated program to manage Hanford as a "Western hub" which would receive off-site TRUW under the "Western Small Quantity Site (SQS) Acceleration Project."

III. PRELIMINARY INJUNCTION STANDARD

In order to obtain a preliminary injunction, a moving party must demonstrate either (1) a probability of success on the merits and the possibility of irreparable injury or (2) serious legal questions are raised and the balance of hardships tips sharply in the moving party's favor. Id. These standards are not inconsistent, but represent a single continuum of equitable discretion whereby the greater the relative hardship to the

moving party, the less probability of success must be shown. State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1389 (9th Cir. 1988).

"Serious questions" are substantial, difficult and doubtful so as to make them a fair ground for litigation. "Serious questions" need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits. Gilder v. PGA Tour, Inc., 936 F.2d 417, 422 (9th Cir. 1991)(citations omitted).

Environmental injury can seldom be adequately remedied by money damages and is often permanent or, at least, of long duration. "If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Village of Gambell, Alaska, 480 U.S. 531, 545, 107 S.Ct. 1396 (1987).

In statute enforcement actions by the government, irreparable injury is generally presumed where a statutory violation is clearly shown. According to United States v. Nutricology, Inc., 982 F.2d 394, 398 (9th Cir. 1992):

> In statutory enforcement cases where the government has met the 'probability of success' prong of the preliminary injunction test, we presume it has met the 'possibility of irreparable injury prong' because the passage of the statute is itself an implied finding by Congress that violations will harm the public. Therefore, further inquiry into irreparable injury is unnecessary.

This presumption of irreparable injury, however, applies only where the government has established a likelihood of success on

the merits. The presumption does not apply where the government makes only a "colorable evidentiary showing" of a statutory violation. In that case, proof of irreparable injury is required. Id.

Where the public interest is involved, the court must examine whether the public interest favors the party moving for an injunction. Sammartano v. First Judicial District Court, 303 F.3d 959, 965 (9th Cir. 2002). While this inquiry is sometimes subsumed into the balancing of hardships, it is better seen as an element that deserves separate attention in cases where the public interest may be affected. Id. at 974. The public interest inquiry primarily addresses impact on non-parties rather than parties. Id.

IV. DISCUSSION

A. NEPA

NEPA is the "national charter for protecting the environment." 40 C.F.R. §1500.1(a). It requires all federal agencies to prepare an environmental impact statement (EIS) for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(C). NEPA is procedural in nature and does not require "that agencies achieve particular substantive environmental results." Marsh v. Or. Natural Res. Council, 490 U.S. 360, 371, 109 S.Ct. 1851 (1989). Instead, it requires agencies to collect, analyze and disseminate information so that "the agency will not act on incomplete information, only

to regret its decision after it is too late to correct." Id.

A federal agency's responsibilities under NEPA do not end with the preparation of an EIS. NEPA obligations may be triggered if an agency's plans change, or if the circumstances surrounding a project are altered. Hodges v. Abraham, 300 F.3d 432, 439 (4th Cir. 2002). CEQ (Council on Environmental Quality) regulations implementing NEPA mandate that a federal agency prepare a supplemental environmental impact statement (SEIS) if "[t]he agency makes substantial changes in the proposed action that are relevant to environmental concerns," or if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Id., citing 40 C.F.R. §1502.9(c)(1). DOE's own regulations for the implementation of NEPA provide that it "shall prepare [an SEIS] if there are substantial changes to [a] proposal or significant new circumstances or information relevant to environmental concerns." Id., citing 10 C.F.R. §1021.314(a). If it is unclear whether an SEIS is required in connection with one of its projects, DOE is obliged to prepare a supplement analysis ("SA"). Id., citing 10 C.F.R. §1021.314(c). An SA must contain sufficient information for DOE to determine (1) whether an existing EIS should be supplemented, (2) whether a new EIS should be prepared, or (3) whether no further NEPA documentation is necessary. Id., citing 10 C.F.R. §1021.314(c)(2).

In order to make an initial determination as to whether a change or new information meets the threshold of significance or

uncertainty needed to require further environmental documentation, DOE may also review and consider previously issued NEPA documents. Hodges, 300 F.3d at 446. DOE is entitled to conduct a preliminary inquiry into whether the environmental impact of a change in an existing proposal is even possibly significant. Based on such preliminary inquiry, if DOE concludes the environmental effect of the change is clearly insignificant, it has taken the "hard look" required by NEPA and no further NEPA documentation is necessary. Id., citing Idaho Sporting Congress Inc. v. Alexander, 222 F.3d 562, 566 (9th Cir. 2000). If "the environmental impacts resulting from the design change are significant or uncertain, as compared with the original design's impacts," then DOE must complete additional NEPA documentation. Id., quoting Price Rd. Neighborhood Ass'n v. United States Dep't of Transp., 113 F.3d 1505, 1508-09 (9th Cir. 1997).

Challenges to final agency actions taken pursuant to NEPA are subject to the review provisions of the Administrative Procedure Act (APA). Southwest Center for Biological Diversity v. Bureau of Reclamation, 143 F.3d 515, 522 (9th Cir. 1998). 5 U.S.C. §702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Pursuant to S U.S.C. §706(2)(A), a reviewing court shall "hold unlawful and set aside agency action, findings and conclusions found to be- arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with the law." For example, an agency's determination of the environmental significance of new information should stand unless it is found to be arbitrary and capricious. Marsh, 490 U.S. at 377. Pursuant to 5 U.S.C. §706(2)(D), a reviewing court shall also "hold unlawful and set aside agency action, findings and conclusions found to be- without observance of procedure required by law." Disputes which are primarily legal in nature are reviewed under a "reasonableness" standard. Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723, 727 (9th Cir. 1995).

There are three tiers of NEPA review: programmatic, sitewide, and project-level. In the case at bar, the May 1997 WM PEIS explained that:

> These tiers represent a hierarchy in which broad and general programs and policies can be addressed in an initial programmatic NEPA review. Subsequent NEPA reviews could then analyze narrower proposals related to the program or policy. First-tier programmatic reviews, such as the WM PEIS, provide environmental evaluations for consideration in making decisions on broad agency actions, such as the adoption of new strategies, programs and policies to guide future actions. **Sitewide NEPA reviews provide the opportunity for considering changes in the overall operations of a DOE site, including mission changes, and provide a current environmental baseline at the site, both to support and simplify project-level NEPA reviews.** Project-level NEPA reviews evaluate the impacts of a specific project at specific locations at a site and are intended in part to provide environmental information on the impact of siting, constructing, and operating a facility.

(PEIS, Vol. I at p. 1-47)(Emphasis added).

There is no per se prohibition to relying on a PEIS to

justify a site-specific project. "A comprehensive programmatic impact statement generally obviates the need for a subsequent site-specific or project-specific impact statement, unless new and significant environmental impacts arise that were not previously considered." Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994). Plaintiffs contend, however, that the 1997 WM PEIS is not "comprehensive" enough to obviate the need for a site-specific impact statement regarding shipment of off-site TRUW to Hanford and secondly, there are new and significant impacts that were not previously considered, in particular those related to transportation risks and terrorism. DOE contends the WM PEIS, in conjunction with other previously issued NEPA documents, is sufficiently comprehensive and there are no new and significant impacts that were not previously considered.

The WM PEIS acknowledged it had certain limitations:

> The level of analysis in the WM PEIS is appropriate for making broad programmatic decisions on what DOE sites should be used for waste management. At the programmatic level, however, it is not possible to take into account special requirements for particular waste streams, different technologies that are or may be available to manage particular wastes, or site-specific environmental considerations such as the presence of culturally important resources or endangered species at a specific location on a site. DOE will rely upon other NEPA reviews, primarily ones that evaluate particular locations on sites or projects (sitewide or project-level reviews), for these analyses. Thus, decisions regarding specific locations for waste management facilities at DOE sites or the waste management technologies to be used will be made on the basis of sitewide or project-level NEPA reviews.

(PEIS, Vol. I at p. 1-48)(Emphasis added).

Elsewhere, the PEIS stated:

> First, DOE will make broad Departmentwide decisions, supported by this programmatic NEPA review, about which sites will manage which wastes. DOE will follow these broad decisions with an analysis of narrower proposals for the implementation of programmatic decisions in related NEPA reviews. Although DOE intends to identify a configuration (i.e., select sites for waste management activities as a result of this programmatic EIS), DOE will take a closer look (including site-specific design, location on the site, operating parameters for new facilities, and site-specific impacts) in sitewide or project-level NEPA reviews.

(Id.) (Emphasis in text).

The PEIS discussed and compared the impacts of the TRUW alternatives, including: health risks, air quality impacts, water resources impacts, ecological resources impacts, economic impacts, population impacts, environmental justice concerns, land use impacts, infrastructure impacts, cultural resources impacts, costs, and environmental restoration analysis. (PEIS, Vol. I at pp. 8-27 to 8-83). At several points in the analysis, the following statement was made:

> Although DOE intends to select sites for waste management on the basis of the WM PEIS, the PEIS will not be the basis for selecting specific locations for facilities at those sites. When selecting locations for facilities at sites, DOE will consider the results of relevant existing or new sitewide or project-level NEPA analyses . . . .

(Id. at pp. 8-56 (Ecological Resources Impacts), 8-67 (Land Use Impacts), 8-69 (Infrastructure Impacts), 8-70 (Cultural Resources Impacts))(Emphasis added).

DOE seemingly concedes that something beyond the WM PEIS might be necessary to construct any **additional facilities** at Hanford for the storage and/or treatment of off-site TRUW[3], but maintains that nothing beyond the WM PEIS is necessary to ship TRUW to **existing facilities** at Hanford. DOE indicates it will not need to construct additional facilities, at least immediately, in order to treat and store off-site TRUW at Hanford.

Be that as it may, the court finds there is a "serious question" whether the language in the PEIS limits DOE's obligation to conduct additional NEPA review to a situation where it would construct additional facilities at Hanford. As indicated above, the PEIS discusses the need for more focused review, beyond programmatic decisions, to account for "site-specific environmental decisions" (PEIS, Vol. I at p. 1-48). Elsewhere, the PEIS states: "A more detailed analysis of potential concerns regarding environmental justice impacts would be conducted in NEPA reviews on site-specific activities involved in treating and storing TRUW" (PEIS, Vol. I at p. 8-64); "Specific mitigation measures [to reduce radiation exposure from treatment of TRUW] would be evaluated in sitewide or project-specific NEPA review" (PEIS, Vol. I at p. 8-34); and "The WM PEIS

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[3] With regard to "site-specific" decisions, the PEIS states that "Records of Decision [RODs] issued on the basis of the WM PEIS will identify sites at which waste management activities will occur," but that "a decision on the specific technology and the particular location of a waste management facility at a site will be made on the basis of sitewide or project-level NEPA reviews 'tiered' from this PEIS." (PEIS, Vol. I at p. 1-52).

identifies the potential cost and environmental impacts of alternative waste management scenarios that could be implemented for each type of DOE waste. After selecting the overall strategy that identifies where DOE will locate waste management facilities, DOE would conduct site-specific NEPA reviews, as necessary, before building any waste management facilities **or transporting waste**" (PEIS, Vol. V at p. 11-40)(Emphasis added).

Sitewide NEPA reviews "provide the opportunity for considering changes in the overall operations of a DOE site, including mission changes, and provide a current environmental baseline at the site, both to support and simplify project-level NEPA reviews." Plaintiffs legitimately contend that shipment of off-site TRUW to Hanford represents a "change in the overall operation" of Hanford and a "mission change" in that whereas the original idea was that DOE sites would by and large store and treat their own waste, DOE now proposes that certain sites, like Hanford, store and treat waste from other sites as well.

It is not, however, just the language in the PEIS which gives the court pause as to whether the PEIS is comprehensive enough to cover the site-specific impacts of treating and storing off-site TRUW at Hanford, and/or whether the PEIS requires supplementation in order to consider new and significant information concerning transportation risk. In April 2002, **before** DOE decided to ship off-site TRUW to Hanford, it issued a "Draft Hanford Site Solid (Radioactive and Hazardous) Waste Program Environmental Impact Statement" ("HSW EIS"). The

"Summary" of the Draft HSW EIS states:

> This Draft . . . provides environmental and technical information concerning the U.S. Department of Energy (DOE) proposal to enhance waste management practices at the Hanford Site near Richland, Washington . . . . [It] **tiers from the [May 1997 WM PEIS] and addresses local decisions needed to implement the WM PEIS records of decision (RODs).** It also updates previous environmental reviews prepared for waste management operations at the Hanford Site. It is being prepared in accordance with the [NEPA], the DOE implementing procedures for NEPA . . . and the . . . [CEQ] Regulations for Implementing the Procedural Provisions of NEPA . . . .

(April 2002 Draft HSW EIS at p. S.1)(Emphasis added).

The Draft HSW EIS addresses "TRU Waste Alternatives," noting that DOE "proposes to expand Hanford Site capabilities for storage, processing, and certification of TRU waste for disposal at WIPP" and "needs to determine which processing, certification, and storage activities are required to properly manage post-1970 TRU waste that currently exists, **or which may be received at the Hanford Site in the future.**" (Id. at p. S.14)(Emphasis added).

DOE's August 2002 "Performance Management Plan For The Accelerated Cleanup Of The Hanford Site" included a "Strategic Initiative," part of which involved "acceptance of limited quantities of TRU from other sites in the DOE complex." (Ex. US000019 to Supplemental Declaration of Todd A. Schrader at pp.44-48). "To support elements of this initiative," DOE indicated it had "prepared and issued for public comment the draft Hanford Site Solid Waste Environmental Impact Statement (HSW EIS)." (Id. at p. 45). The "Approach" was that:

> After addressing agency, Tribal and stakeholder comments, we will finalize the Hanford Site Solid Waste Environmental Impact Statement (HSW EIS) and then issue a ROD. The HSW EIS contains analysis of the **impact of receiving additional waste**, and the ROD will provide the policy and path forward for the waste management activities described in this initiative.

(Id. at p. 46)(Emphasis added).

It is difficult to ignore plaintiffs' argument that DOE intended the 2002 Draft HSW EIS to constitute the future sitewide or project-level NEPA review alluded to in both the May 1997 WM PEIS and the January 1998 ROD, and that the Draft amounts to an acknowledgement by DOE that additional NEPA review was necessary before it could ship off-site TRUW to Hanford. As plaintiffs point out, a Draft HSW-EIS does not end DOE's NEPA review obligation.[4] The plaintiffs say a sufficient Final HSW EIS covering the site-specific impacts of treating and storing off-site TRUW at Hanford and updating transportation risks would satisfy DOE's NEPA obligation.

The Draft HSW EIS, in conjunction with the May 1997 WM PEIS, raises at least a "serious question" whether DOE viewed treatment and storage of off-site TRUW at Hanford, and the treatment and storage of TRUW already there, as a single major federal action; as "connected" actions in that they are interdependent parts of a larger action (final disposal of TRUW at WIPP) which depend on the larger action for justification; or as "cumulative" actions

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[4] DOE just recently issued a Revised Draft dated March 2003.

because DOE "proposes to expand Hanford Site capabilities for storage, processing, and certification of TRU waste for disposal at WIPP" and "needs to determine which processing, certification, and storage activities are required to properly manage post-1970 TRU waste that currently exists, or which may be received at the Hanford Site in the future." (April 2002 Draft HSW EIS at p. S.14).[5]

DOE's reliance on prior NEPA documents, other than the PEIS, does not lessen the court's concern. In addition to the PEIS, DOE cites the Final Environmental Impact Statement (FEIS) which it prepared in 1987 regarding the "Disposal Of Hanford Defense High-Level, Transuranic And Tank Wastes." According to DOE, TRUW is examined, processed, packaged and certified for shipment to WIPP at Hanford's Waste Receiving and Processing Facility ("WRAP") and DOE "considered the environmental impacts of the construction and operation of this facility as part of the 1987 EIS examining the strategies for the disposal of high-level, transuranic and tank wastes at Hanford." DOE also notes that in 1995, it prepared an environmental assessment (EA) "that examined the environmental impacts of the construction and operation of

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[5] Actions are "connected" if they automatically trigger other actions which may require environmental impact statements; cannot or will not proceed unless other actions are taken previously or simultaneously; are interdependent parts of a larger action and depend on the larger action for justification. Wetlands Action Network v. U.S. Army Corps of Engineers, 222 F.3d 1105, 1118 (9th Cir. 2000), citing 40 C.F.R. §1508.25(a)(1). Cumulative actions are those "which when viewed with other proposed actions have cumulatively significant impacts." Id., citing 40 C.F.R. §1508.25(a)(2).

the facilities in 200 West Area of Hanford where transuranic waste is stored and prepared prior to shipment."[6] According to DOE, the storage facilities considered in the Solid Waste Retrieval Complex EA are where off-site TRUW, such as that from ETEC and Battelle, is stored prior to preparation at WRAP and shipment to WIPP. Finally, DOE says the September 1997 WIPP-SEIS II (Waste Isolation Pilot Plant Disposal Phase, Final Supplemental Environmental Impact Statement) examined the risk of accidents during the preparation of TRUW at Hanford's WRAP, including equipment failures and an earthquake-initiated fire event.

Obviously, the 1987 FEIS and the 1995 Solid Waste Retrieval Complex EA preceded the May 1997 WM PEIS. Indeed, the 1987 FEIS was 10 years before the PEIS and its continuing value is suspect considering DOE's current efforts to come up with a Final HSW EIS which addresses the management of waste at Hanford, including TRUW. The State points out that the 1995 EA is not referenced in the 1997 WM-PEIS, nor is it, or the 1987 FEIS referenced in the September 6, 2002 ROD. Moreover, the State observes that the 1995 EA deals specifically with on-site TRUW, not off-site TRUW, The WIPP-SEIS II, prepared in September 1997, clearly was not in

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[6] Environmental Assessment for Solid Waste Retrieval Complex, Enhanced Radioactive and Mixed Waste Storage Facility, Infrastructure Upgrades, and Central Waste Support Complex (September 1995).

In circumstances where it is unclear whether an EIS is necessary, a federal agency is obliged to complete an EA reviewing and analyzing whether an EIS is required. 40 C.F.R. §1508.9.

existence when the May 1997 WM PEIS was issued.

As noted above, it is true that in order to make an initial determination as to whether a change or new information meets the threshold of significance or uncertainty needed to require further environmental documentation, DOE may review and consider previously issued NEPA documents. DOE can review and consider a variety of prior NEPA documents in preparing an SA or even deciding whether to do an SA. That, however, appears to be different from whether an existing EIS is comprehensive enough to adequately support a "Revised ROD."

Pursuant to 10 C.F.R. §1021.315(e), "DOE may revise a ROD at any time, so long as the revised decision is adequately supported by an existing EIS." The September 6, 2002 ROD "revised" the January 1998 ROD. The September 6, 2002 "Revised" ROD did not reference either the 1987 FEIS or the 1995 EA.[7] Either the ROD is adequately supported by the existing PEIS or it is not, and it does not appear DOE can go looking for other documents, not already incorporated in the PEIS or properly "tiered" to the PEIS, in order to bolster the PEIS. Otherwise, it seems DOE could evade public scrutiny of its reliance on those other documents to justify its recent decision to ship TRUW to Hanford. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989)(preparation of EIS "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking

[7] The January 1998 ROD referenced only the 1997 PEIS.

process and the implementation of that decision"); Marsh, 490 U.S. at 368 (purpose of NEPA is to "foster both informed decisionmaking and informed public participation").

The September 6, 2002 ROD discussed transportation risk and concluded the risks were not significant based on information in the WIPP-SEIS II and the 1990 Environmental Assessment (EA) for Battelle Columbus Laboratories Decommissioning Project. The WIPP-SEIS II did not propose shipment of TRUW from Battelle to Hanford and therefore, DOE had to rely on the 1990 EA which preceded the PEIS by seven years.[8] There is no reference to the 1990 EA in the PEIS, specifically the transportation analysis contained in Appendix E to the PEIS. Indeed, the PEIS selected "conceptual transportation routes . . . which may not be the actual routes that will be used in the future." (PEIS, Vol. IV at p. E-2). The PEIS added that:

> Actual routes will be determined during the transportation planning process.
>
> **Transportation mode and routing decisions will be made on a site-specific basis during the transportation planning process. Sites can use the transportation analyses in this WM PEIS to make site-specific transportation decisions or, if necessary, conduct additional transportation analyses.**
> . . . .

[8] All of the ETEC waste has apparently been shipped to Hanford and so injunctive relief is moot as to that particular waste. The WIPP-SEIS II analyzed the transportation of RH-TRUW from ETEC to Hanford for preparation prior to disposal at WIPP. It did not, however, analyze transportation of CH-TRUW from ETEC to Hanford.

(Id.) (Emphasis added).[9]

The 2002 Draft HSW EIS relies on 2000 census data, as opposed to the 1990 census data relied on by the PEIS and WIPP SEIS II, and the 1980 census data relied upon by the Battelle EA. The 2002 Draft HSW EIS observes that the population of Benton County increased from 26.6 percent from 1990 and that the Franklin County population increased 31.7 percent. (Draft HSW EIS, Vol. I at 4.80-4.81). Furthermore, the March 2003 Revised Draft HSW EIS contains a section regarding "Transportation Impacts Within Washington and Oregon of Offsite Shipments." The section calculates the impacts of offsite transportation of solid wastes to and from Hanford. (Revised Draft HSW EIS, Vol. II at H.32-H.38).

Just as there is a "serious question" whether the Draft HSW EIS represents implicit acknowledgement by DOE that the WM PEIS contemplated a sitewide or project-level NEPA analysis before off-site TRUW could be treated and stored at Hanford, there is a "serious question" whether the Draft HSW EIS represents implicit acknowledgement by DOE that reevaluation of transportation risk is necessary because of the recent decision to ship off-site TRUW to Hanford.

This is a motion for preliminary injunction and so the court is not making a final determination concerning the validity of DOE's argument that the alternatives considered in the PEIS

[9] See also PEIS, Vol. V at p. 5-262: "Transportation impacts were analyzed on a national rather than site-specific basis."

"bound" the risks presented by shipments of offsite TRUW to Hanford from ETEC and Battelle, as well as potential shipments from additional sites. It is true there is only one official ROD at issue here, that authorizing shipment of offsite TRUW to Hanford from ETEC and Battelle. Plaintiffs, however, have presented documentary evidence which raises a "serious question" whether implementation of the SQS Acceleration Project is a foregone conclusion and as such, the impacts of shipments of those additional quantities of waste should also be considered in additional NEPA review. Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002).[10] It is not clear that the PEIS would "bound" the risks presented if all of the waste proposed to be shipped to Hanford pursuant to the SQS Acceleration Project was in fact shipped there.[11]

The likelihood of plaintiffs succeeding on their NEPA claims may border on the "probable." While the court is unsure if it is probable plaintiffs will succeed on those claims, the court is sure that plaintiffs have raised "serious questions" whether there is a NEPA violation and therefore, have at least a "fair" chance of success on the merits.

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[10] Cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, or reasonably foreseeable future actions." 40 C.F.R. § 1508.7.

[11] Nothing herein should be construed as a favorable or unfavorable comment upon the wisdom of DOE's decision to ship ETEC and Battelle TRUW to Hanford or its consideration of making Hanford a "hub" for treatment and storage of TRUW from other sites. This court is only concerned with whether DOE followed the correct procedure under NEPA.

B. HWMA

The State of Washington administers a hazardous waste program authorized under the federal Resource and Conservation Recovery Act (RCRA), 42 U.S.C. §6901 et seq. This program includes the HWMA, RCW 70.105. The State contends TRUW mixed with non-radioactive hazardous waste (TRUWM or TRUM) which DOE intends to ship to Hanford from Battelle violates the HWMA and its implementing regulations, Washington Administrative Code (WAC) 173-303.[12] This is so, according to the State, because this additional waste is "land-disposal restricted" (LDR) and will not be stored at Hanford solely for the purpose of accumulating enough hazardous waste as necessary to facilitate proper recovery, treatment or disposal. WAC 173-303-140(2)(a) and 40 C.F.R. §268.50.[13] The State contends Hanford already has more than enough LDR waste which is not being stored solely for the purpose of facilitating proper recovery, treatment or disposal.

A treatment, storage or disposal facility may store LDR wastes for up to one year unless the State can demonstrate such storage is not solely for the purpose of accumulating such quantities of hazardous waste as necessary to facilitate proper recovery, treatment, or disposal. 40 C.F.R. §268.50(b). If such

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[12] The State concedes that TRUW not mixed with hazardous substances is not covered by the HWMA.

[13] WAC 173-303-140(2)(a) provides that land disposal restrictions for wastes designated in accordance with WAC 173-303-070(3)(a)(i), (ii), and (iii), are the restrictions set forth by the Environmental Protection Agency in 40 CFR Part 268.

storage extends beyond one year, the facility has the burden of proving the storage is solely for the purpose of accumulating sufficient quantities to facilitate proper recovery, treatment or disposal. 40 C.F.R. §268.50(c). According to the State, DOE does not intend to ship off-site TRUWM to Hanford solely to allow the accumulation of such quantities of hazardous waste as necessary to facilitate proper recovery, treatment or disposal, but rather: 1) because it wants to shift such waste away from other sites to allow the early closure of those sites; 2) because of a lack of current characterization capacity at those other sites; and 3) because of a desire to eliminate storage currently utilized for TRUWM at those other sites.

DOE contends that 1996 amendments to the WIPP Land Withdrawal Act (LWA), Pub. L. 102-579, 106 Stat. 4777 (1992), preclude the State from applying HWMA LDR provisions to TRUWM bound for Hanford or already stored there. The amended LWA, Section 9(a)(1), provides in relevant part:

> With respect to transuranic mixed waste designated by the Secretary for disposal at WIPP, such waste is exempt from treatment standards promulgated pursuant to section 3004(m) of the Solid Waste Disposal Act (42 U.S.C. 6924(m)) and shall not be subject to the land disposal prohibitions in section 3004(d), (e), (f), and (g) of the Solid Waste Disposal Act.[14]

DOE acknowledges that Section 9(a)(1) explicitly cites the RCRA's LDR treatment and land disposal prohibitions (section 3004(d),(e), (f), (g) and (m)), but not the storage prohibition

[14] 42 U.S.C. §6924(d), (e), (f) and (g).

found in section 3004(j) (42 U.S.C. §6924(j). Section 3004(j) provides:

> In the case of any hazardous waste which is prohibited from one or more methods of **land disposal** under this section (or under any regulations promulgated by the [EPA] Administrator under any provision of this section) the **storage** of such hazardous waste is prohibited unless such storage is solely for the purpose of the accumulation of such quantities of hazardous waste as are necessary to facilitate proper recovery, treatment or disposal.

(Emphasis added). According to DOE, this makes it clear that the LDR **storage** prohibition applies only to waste that is subject to the **disposal** prohibitions, and section 9(a)(1) exempts waste designated for disposal at WIPP from those **disposal** prohibitions. The court finds DOE's argument compelling, notwithstanding that Section 9(a)(1) of the LWA says nothing about the **storage** prohibition.

The same goes for the failure of Section 9(a)(1) to explicitly preclude application of LDR provisions under state law, even though it explicitly precludes application of such provisions under the federal RCRA (§3004(d), (e), (f), (g) and (m)). It is difficult to imagine how the State's LDR provisions could be compatible with Section 9(a)(1)'s exemption of TRUWM from federal RCRA LDR provisions. The federal RCRA LDR provisions are incorporated by reference into the HWMA and its accompanying regulations. Furthermore, the HWMA, RCW 70.105.109, acknowledges the State's authority to regulate hazardous waste may be preempted by federal law.

The State contends that restricting **storage** of LDR waste serves a purpose which is independent from the LDR **disposal** prohibition. The State notes that Congress enacted the storage prohibition with the belief that allowing storage of large quantities of waste as a means of forestalling required treatment would involve health threats equally serious to those posed by land disposal, and therefore opted in large part for a "treat as you go" regulatory regime. Hazardous Waste Treatment Council v. U.S. E.P.A., 886 F.2d 355, 357 (D.C. Cir. 1989). Thus, says the State, it is "highly unlikely Congress would, in effect, write DOE a blank check to indefinitely store significant volumes of waste around the country that DOE expects, at some undetermined time, may be disposed of at WIPP."

While the State contends "[t]he policy of storage prohibition is frustrated by DOE's strained reading of [the LWA]," this court is not necessarily convinced DOE's reading is so strained. The storage prohibition was enacted **before** the 1996 amendments to the LWA.[15] In the 1996 amendments to the LWA, Congress recognized it was going to take considerable time before all TRUW could be disposed of at WIPP. Section 10 of the LWA states:

> It is the sense of Congress that the Secretary should complete all actions . . . to commence emplacement of transuranic waste underground for disposal at WIPP not later than November

[15] This is also true with regard to the 1992 RCRA amendments by the Federal Facility Compliance Act which required sites to develop treatment plans for hazardous waste, but gave them a delay of three years in developing such plans.

> 30, 1997, provided that before that date all applicable health and safety standards have been met and all applicable laws have been complied with.

November 30, 1997 was merely the date for "commencement" of emplacement of TRUW at WIPP.

According to DOE, it will need 10 to 20 years to move its existing inventory of TRUW to WIPP and therefore, subjecting TRUWM designated for disposal at WIPP to the LDR storage prohibition is tantamount to requiring treatment of those wastes. DOE observes that the disposal of its TRUW and TRUWM at WIPP is an enormous undertaking that could take decades and there is no way it could be accomplished within the one year provided by the storage prohibition. The effect of the State's reading of the 1996 amendments to the LWA, according to DOE, is to require what Congress sought to avoid, that being the unneeded treatment of wastes that will be disposed of at WIPP. This argument carries some weight, considering that Section 9(a)(1) of the amended Act exempts TRUWM from both **treatment standards** and **disposal prohibitions**.

The State contends that even if the LWA exemption extends to storage of LDR waste as a general matter, the particular waste at issue here (that from ETEC and Battelle) has not been "designated by the Secretary for disposal at WIPP." The State asserts the September 6, 2002 ROD does not indicate any specific action by the Secretary of Energy to designate the ETEC and Battelle TRUW for disposal at WIPP. The State notes that the ROD merely says "DOE **expects** that this TRU waste will ultimately be shipped to

the Waste Isolation Pilot Plant (WIPP) in New Mexico for disposal." (September 6, 2002 ROD at p. 1 (Summary))(Emphasis added). Elsewhere in the ROD is a statement that "DOE has decided to transfer . . . TRU waste from the West Jefferson site to the DOE Hanford Site for storage prior to disposal at WIPP" and another statement that "DOE has decided to transfer . . . TRU waste . . . from ETEC to the DOE Hanford Site for storage prior to planned disposal at WIPP." (Id. at p. 5)(Emphasis added).

According to the State, the LWA does not define the phrase "transuranic mixed waste designated by the Secretary for disposal at WIPP," nor do any DOE regulations interpret the phrase. The State observes, however, that not just any TRUW can be shipped to WIPP. For example, RH-TRUW and PCB-contaminated TRUW cannot currently be disposed of at WIPP. Thus, says the State, these uncertainties place limits on what TRUW can be "designated by the Secretary for disposal at WIPP." The State asserts that if TRUWM cannot meet WIPP's acceptance criteria, it cannot be lawfully disposed of at WIPP and cannot be "designated" for disposal at WIPP.

DOE's response is that any suggestion it must obtain all regulatory approvals and construct all facilities needed to dispose of TRUWM before it designates such waste for disposal at WIPP "has no foundation in the language of the statute and its effect would be to nullify the exemption." DOE argues the use of the term "designate" in Section 9(a)(1) connotes a broad grant of authority to DOE to make a designation without any elaborate

process. To the extent 9(a)(1) is ambiguous with regard to the term "designate," DOE says that as the agency charged with administering the LWA, its reasonable interpretation of the same is entitled to deference.

DOE contends the State's proposed construction of the 1996 amendments to the LWA makes sense only if Congress believed, or it was reasonable to expect, that DOE would have obtained all of the regulatory approvals it needed to dispose of all TRUWM within one year that was subject to LDR provisions. According to DOE, the effect of the State's construction is to require DOE to treat virtually all TRUWM to be disposed of at WIPP. DOE asserts the State's construction is not necessary to assure TRUWM is safely stored pending disposition at WIPP because the 1996 amendments do not except those materials from the other safe storage requirements of the federal RCRA.

Whether Washington's HWMA is trumped by the LWA is a question of first impression. Furthermore, the court has not been provided with any particularly helpful legislative history about the 1996 amendments to the LWA. On balance, the court finds DOE's arguments more compelling as a reflection of what Congress rationally intended by way of the LWA. The court can say with reasonable assurance it does not believe the State has established a probability of succeeding on its HWMA claim. Whether the State has raised a "serious question" that the HWMA is not trumped by the LWA is a closer call. Mindful again that this is only a motion for preliminary injunction, the court is

not making a final determination that DOE's TRUWM is exempt from the State's HWMA. Based on the record before it currently, however, the court finds there is less than a "fair" chance the State will prevail on its HWMA claim.

C. BALANCE OF HARDSHIPS

When the injury is environmental and that injury is "sufficiently likely," the balance of harms will usually favor the issuance of an injunction to protect the environment. Amoco, 480 U.S. at 545. There is no dispute that TRUW, particularly RH-TRUW, poses significant hazards to human health and the environment due to its toxicological and radiological effects. Furthermore, there is a risk of release and exposure associated with handling and transporting TRUW. Most significant, however, is the reality that once off-site TRUW is shipped to Hanford, sending it back to the generating sites may not be possible. And while CH-TRUW shipped to Hanford stands a reasonable chance of being promptly dispatched to WIPP, such is not the case for RH-TRUW and TRUW mixed with PCBs. The court is also mindful that permitting the balance of the Battelle TRUW to be shipped to Hanford, prior to final resolution of this litigation, could set a precedent regarding any future intended shipments of TRUW to Hanford from other sites.

The court is not persuaded the State has unduly delayed bringing its motion for preliminary injunction, therefore belying any concern it has about the likelihood of environmental injury

from shipments of off-site TRUW to Hanford. The record indicates the State was involved in good faith negotiations with DOE to reach a compromise when those negotiations collapsed on March 1, 2003, prompting the State to file its lawsuit on March 4. The plaintiff non-profit groups did not unduly delay in bringing their motion as they were entitled to rely on and await the outcome of the State's negotiations with DOE.

DOE contends the fact plaintiffs have not objected to shipments of TRUW from Hanford to WIPP undercuts the State's argument that environmental injury is sufficiently likely as a result of continued shipments of off-site TRUW to Hanford. The court does not believe plaintiffs are taking an inconsistent position. All that is currently being transported to WIPP from Hanford is the less radioactive CH-TRUW. Awaiting imminent transport to Hanford from Battelle is TRUW which is predominantly remote-handled in nature and once it arrives at Hanford, it will not be going anywhere else soon. Furthermore, plaintiffs express concern about increasing the mileage that off-site TRUW has to travel by first being shipped to Hanford and then, perhaps later, to WIPP, rather than being shipped directly to WIPP. Plaintiffs acknowledge that if additional NEPA review reveals deficiencies about transportation of TRUW, that could warrant enjoining shipments of TRUW from Hanford to WIPP. Moreover, the NEPA claims here involve more than just the transportation of TRUW to Hanford. Plaintiffs are also concerned with the treatment and storage of off-site TRUW at Hanford in combination with the

already considerable TRUW which has been generated on-site at Hanford. While the ETEC and Battelle TRUW may be a small amount compared to what is already at Hanford, DOE apparently thought shipments of off-site TRUW to Hanford were significant enough to warrant specific mention in the 2002 Draft HSW EIS.

The September 6, 2002 ROD states that "DOE needs to begin shipping its TRU waste from the West Jefferson and ETEC sites in the near future in order to meet the Department's timetables for cleanup of contaminated buildings at these sites" (Emphasis added). The ROD indicates the West Jefferson site's TRUW is being stored in one of the buildings scheduled for demolition and "[i]n order to meet the site's schedule for building demolition, removal of the stored TRU waste must begin by the summer of 2002 and be completed within 12 months, well in advance of DOE's anticipated time frame (late 2004 or 2005) for commencing shipments of remote-handled TRU waste to WIPP." Apparently, Congress has mandated closure of the Battelle West Jefferson Site by 2006.

DOE says the facility at Battelle where the TRUW is currently being stored "is not designed for long-term use and is slated for demolition." DOE does not contend, however, that there are emergent safety concerns regarding that TRUW. In fact, Assistant Secretary Roberson acknowledges the drums at Battelle West Jefferson are "secure."

The court fails to see that DOE will be seriously prejudiced by delaying demolition of the buildings at the West Jefferson

site for a reasonable period of time while this case is being litigated to a final resolution. The RH-TRUW which DOE intends to ship to Hanford from the West Jefferson site would not be immediately processed at Hanford and sent off to WIPP. Hanford does not have a current capability to certify RH-TRUW for acceptance at WIPP and furthermore, WIPP is not currently allowed to accept any RH-TRUW.

DOE says that unless it is allowed to continue shipments from the Battelle West Jefferson site, it will be forced to construct additional facilities at a substantial cost. Of course, the construction of additional facilities becomes necessary only if the existing facilities are demolished. As discussed above, the court questions whether the existing facilities in fact need to be demolished immediately.

In the absence of an injunction, the balance of the Battelle TRUW (7 drums of CH-TRUW and 111 drums of RH-TRUW) will be shipped to Hanford and regardless of the outcome of further proceedings in this court or before the Ninth Circuit, it will likely remain at Hanford. On the other hand, it appears DOE is not precluded from making reasonable interim adjustments to a preliminary injunction. Accordingly, the court finds the balance of hardships tips sharply in favor of plaintiffs.

D. PUBLIC INTEREST

The State asserts its citizens have a significant interest in ensuring the federal government remedies the contamination at

Hanford. The States says its citizens are entitled to understand how DOE can justify adding more waste to the existing contamination at Hanford and whether DOE can do so without increasing the existing risks or extending the time it will take to complete the cleanup.

DOE contends the public interest embraces a larger national interest. DOE says allowing the balance of the Battelle TRUW to be shipped to Hanford "may" accelerate cleanup at Hanford because the methodology used at Battelle to characterize and package RH-TRUW has been provided to Hanford which will facilitate its ability to participate in the demonstration of the WIPP certification program for RH-TRUW. Because there is a commitment to give priority to Battelle RH-TRUW once WIPP can accept this kind of waste, DOE contends Hanford would be the pilot facility for the RH certification program which could position Hanford to be the first site to ship RH-TRUW to WIPP. Obviously, this is somewhat speculative and the State duly notes it has no assurance when Hanford might be able to send RH-TRUW to WIPP.

DOE also contends that allowing the shipments from ETEC and Battelle to proceed will free up approximately $36 to $42 million to be spent on cleanup efforts rather than on building new facilities at ETEC and Battelle. DOE says allowing the shipments will permit deployment of a CH-TRUW mobile certification system to another facility which otherwise would have gone to Battelle. The court questions whether these alleged savings matter much to the public when Hanford presently does not have the capability to

certify the more lethal RH-TRUW, it is unclear when it will have such capability, and in any event, WIPP cannot presently accept RH-TRUW.

The court finds the public interest favors the plaintiffs.

V. CONCLUSION

DOE asserts this dispute is not really about shipment of off-site TRUW to Hanford, but is an effort by the State to gain leverage over the management of the waste already at Hanford. Even if that is so, it does not undermine plaintiffs' claims or their requests for a preliminary injunction considering the inherent relation of TRUW already on-site at Hanford and off-site TRUW which DOE intends to ship to Hanford.

Plaintiffs' motions for preliminary injunction (Ct. Rec. 5 in CT-03-5018-AAM and Ct. Rec. 7 in CT-03-5044-AAM) are **GRANTED** and defendants are hereby **ENJOINED** from making any further shipments of TRUW to Hanford pending final resolution of this litigation. An injunction bond from the plaintiffs will not be required. Because of the State's motion, DOE has indicated it does not oppose waiver of bond. Bond is waived because of the public interest at stake.

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Pursuant to 28 U.S.C. §1292(a)(1), this order is immediately appealable to the Ninth Circuit. An appeal by defendants seems likely given the extent to which the legal arguments and the record have already been developed. Accordingly, this court will refrain from any further scheduling pending a request from the parties.

IT IS SO ORDERED. The District Executive shall forward copies of this order to counsel of record in CT-03-5018-AAM and CT-03-5044-AAM.

DATED this 9th of May, 2003.

ALAN A. McDONALD
Senior United States District Judge